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ABSTRACT

A narration of the federal Department of Education's attempt to promulgate regulations protecting minority-language students' civil rights examines the roles of federal agencies, Congress, state and local governments, the courts, civil rights groups, teacher and administrator groups, and the media in the regulatory process. An introductory section reviews the legislative, executive, and judicial branches' constitutional roles in education. Part 2 narrates legislative and judicial developments involving students with limited English proficiency (LEP) from 1964 to 1980, highlighting the roles of Congress, the Education Department (ED) and its predecessors, the courts, the Lau v. Nichols decision (1974), and the "Lau remedies" governing schools' services to LEP students from 1975 to 1980. Part 3 describes ED's proposed regulation, published in 1980, and its major features. Reactions to the proposed regulation are reported in part 4, including ED's analysis of regulatory impacts, the report of the President's regulation analysis group, Congress's veto threat, and the regulation's withdrawal. Part 5 discusses factors affecting the response to the regulation, including multicultural problems, teacher employment, teaching methods, states' rights, and media interpretations. Further factors, involving national political changes, problems in the regulation and ED, and civil rights issues, are reviewed in the final section. (RW)

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THE MAKING (AND UNMAKING) OF A CIVIL RIGHTS REGULATION: LANGUAGE MINORITY CHILDREN AND BILINGUAL EDUCATION

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Abstract

Focusing on the Department of Education's recent attempt to promulgate a federal standard for protecting the civil rights of language minority students, this article examines the complex reality of the regulative process itself. In the context of a sensitive civil rights problem, federal agencies, Congress, state and local officials, civil rights groups, teacher and educational administration interest groups, and the media impact the extent and nature of the education afforded a significant minority population.

The author analyzes the relationships between these players as well as those between crucial pieces of legislation and relevant court decisions--all of which have contributed to different approaches in establishing and enforcing federal standards.

I. INTRODUCTION

The respective roles of the three branches of the federal government in determining which categories of students are entitled to special protection, and the nature of that protection, has changed significantly since the decade after Brown v. Board of Education.[1] The complexities involved in developing a federal standard and the interactions among all three branches are nowhere more apparent than in the Department of Education's recent attempt to promulgate a federal standard for protecting the civil rights of langauge minority students.

This article is not a legal analysis of the basis for the language minority regulations nor does it provide a detailed analysis of the Department of Education's legal authority to issue them. It is an attempt to describe the regulations process in the context of a sensitive civil rights problem, to reveal the roles of the various actors in the process, and to illustrate the relationships among Congress, courts and the federal agency in the evolution of a civil rights standard in education.

By way of background for this discussion, it is useful to outline the nature of the authority for the exercise of a federal role in education. Since education is a state function that is generally delegated in large part to local school districts, what basis is there in our system for a federal role at all?

Legislative Branch. There are two types of statutes enacted by Congress in the area of education: the civil rights statute and the grant-in-aid or program statute. The civil rights statute is usually brief and without much detail, but directs the appropriate federal agencies to promulgate regulations to implement the statute's objective.[2] There is often little guidance that can be gleaned from the legislative history; Congress anticipates that the agency will determine what kinds of practices by state or local educational agencies discriminate against the particular protected group.[3] Examples of such statutes are Title VI of the Civil Rights Act of 1964 (banning discrimination in federal programs on the basis of race, color, or national origin)[4] Title IX of the Education Amendments of 1972 (banning discrimination on the basis of sex),[5] and Section 504 of the Rehabilitation Act of 1973 (banning discrimination on the basis of handicap).[6] Congress' authority to enact such statutes can be found in Section 5 of the Fourteenth Amendment: "Congress shall have the power to enforce the provisions of this article by appropriate legislation." These statutes provide no federal funds to school districts, but the sanction for violation of those statutes or the regulations promulgated under them is to withhold all federal funds that may, under various grant-in-aid statutes, go to the program or activity in which the discrimination occurs.[7]

The grant-in-aid or program statute, on the other hand, is not necessarily tied to the equal protection clause of the

Constitution. The statute may be designed to effectuate notions of social justice beyond any concept of what is required by the Constitution,[8] to assist state or local educational agencies to comply with constitutional or civil rights requirements imposed by courts,[9] or to implement such national concerns as the inadequacy of science training in secondary schools[10] or the underfunding of libraries at the local level.[11]

In general, program statutes are considerably more detailed than civil rights statutes and funds are appropriated to encourage the development of special programs. Regulations are more likely to fill in the interstices of the statute or clarify statutory criteria for the distribution of the funds. Funds are available to states on a formula basis or project basis. Under the taxing and spending power of Article I of the Constitution, Congress can, of course, impose conditions on the receipt of federal funds.[12] Although states and localities are not required to take the federal funds, if they do, they must comply with the conditions. The sanction for violation of the statutory conditions or the regulations implementing the statute affects only the funds awarded under that particular statute.[13]

Executive Branch. Federal agencies are directed by Congress to develop regulations to flesh out statutes.[14] What is important to note is that in the case of civil rights statutes, Congress has usually provided very little guidance to agencies who are left to define what is discrimination, how it is to be

monitored, what constitutes compliance, etc. In the case of program or grant-in-aid statutes, often, though not always, much less discretion is left to the agencies.

Judicial Branch. Federal courts are to interpret and apply the constitution, federal laws, and their implementing regulations only where there is an actual case or controversy.[15] In the aftermath of San Antonio Independent School District v. Rodriguez,[16] the courts have played a limited role as the creators of new rights or classifications entitled to special protection in the area of education. Lower courts, in the face of that decision, have been somewhat reluctant to expand the number of classes entitled to special constitutional protection, or to find that some level of education is a fundamental right--particularly where an affirmative governmental duty is claimed in the absence of any prior discrimination.[17] Thus, the courts have largely left to the legislature the job of deciding who among competing claimants is entitled to special protection--partly because the legislature has done just this and courts prefer to decide cases on non-constitutional grounds.[18]

During the past 15 years, then, it has been Congress that has expanded the categories of students to be given special protection and defined and redefined the equal educational opportunity that is to be accorded these categories of students. There has been a subtle, and at times not so subtle, shift from the idea of non-discrimination--that governmental entities

stop doing something they have been doing: imposing barriers that prevent certain classes of children from obtaining the same education that other children are receiving--to a standard that imposes an affirmative duty on governmental entities to remove a barrier not necessarily of the government's making. In the first case, the government is ordered to stop treating children differently, because of certain traits or characteristics, than it treats others. In the second case, the government is ordered to treat children with certain traits or characteristics differently--that is, to provide them with some special help that it does not provide other children in order to enable those children to be brought up to a level where they can compete equally. If they do not receive this special treatment, the argument goes, they do not have an opportunity equal to that of others to take advantage of the education the government offers to all.

II. THE DEVELOPMENT OF A STANDARD FOR THE PROTECTION OF LANGUAGE MINORITY CHILDREN

In order to understand the context in which a standard for the protection of the civil rights of language minority children was developed, the activity of Congress in the bilingual area will be briefly reviewed. In 1968, Congress passed the Bilingual Education Act,[19] under which a small amount of funds was to be made available to school districts that applied. Among the suggested programs suggested by Congress were bilingual education programs, and "programs

designed to impart to students a knowledge of the history and culture associated with their languages, . . ."[20] In 1974, Congress amended the act[21] and noted that the purpose was "to encourage the establishment and operation, where appropriate, of educational programs using bilingual educational practices, techniques, and methods."[22] Bilingual education was defined as the giving of instruction in English "and, to the extent necessary to allow a child to progress effectively through the educational system the native language of the children of limited English-speaking ability."[23]

The House, in reporting out the 1974 bill, articulated its understanding of what bilingual education involves:

> . . . the use of two languages, one of which is English as the media of instruction in a comprehensive school program. There is evidence that use of the child's mother tongue as a medium of instruction concurrent with an effort to strengthen his command of English acts to prevent retardation in academic skill and performance. The program is also intended to develop the child's self esteem and a legitimate pride in both cultures. Accordingly, bilingual education normally includes a study of the history and cultures associated with the mother tongue.[24]

Thus, Congress had not only encouraged bilingual educational programs, but had indicated that such programs were preferred over others.

The important distinction between the Bilingual Education Act and what the Department of Education proposed to do under the Civil Rights Language Minority Regulations is that the former provides fiscal incentives to willing school districts that were already committed to assisting limited English-proficient children, while the latter imposes an affirmative duty on school officials to provide special assistance to limited English-proficient children without providing any fiscal incentives and with the sanction for non-compliance being the cut-off of all federal funds received by the school district. A further distinction is that Title VII projects currently serve approximately 400,000 limited English-proficient students, whereas the Department of Education estimates that there are three and one-half million limited English-proficient students in this country.[25]

The important issues, then, are who determines the nature of that special assistance that must be provided as the federally-protected minimum and how is this federal minimum standard for the treatment of limited English-proficient children derived?

The usual "administrative law" view of the process is that Congress articulates a general principle, and the execu-

tive branch, through the promulgation of regulations, fleshes out the general principle in light of its greater expertise. Once the authoritative rule is promulgated, it is then applied to all school districts. If a local school district refuses to comply with the authoritative rule, then, under Title VI of the Civil Rights Act of 1964, sanctions are imposed, but only after a determination by an administrative law judge and/or a court that the district is indeed out of compliance.

The reality is much more complex. This article describes how the executive branch actually developed the language minority standard, including the impact of the other two branches on the standard's development and the various roles that non-governmental participants played.

The Players

The Congress. In 1964, Congress passed an extraordinary Civil Rights Act. Title VI of that act provides as follows:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[26]

The statute authorizes and indeed, directs, the federal agencies

> to effectuate the provisions . . . of this title . . . by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statutes authorizing the financial assistance . . . .[27]

Thus Congress delegated to the agency the power to regulate. There was little legislative history, however, illuminating what Congress meant by the phrase "or national origin."

The Agency. In 1970, the Department of Health, Education, and Welfare (HEW), in accordance with its responsibility to implement Title VI in the education and health areas, issued a memorandum that said that local school districts " . . . must take affirmative steps to rectify English language deficiencies which have the effect of excluding national origin minority children from participation in the educational program offered."[28] The memorandum noted that Title VI compliance reviews conducted in school districts with large Spanish-surnamed populations had revealed a number of practices which had the effect of denying equality of educational opportunity to these children. Thus violations of Title VI included the following:

1. Failure to take affirmative steps to remedy the English language deficiency of these students;

2. The assignments of students to classes for the mentally retarded on the basis of criteria that reflect English language skills; the denial of access to college preparatory courses on a basis directly related to the school's failure to inculcate English language skills;
3. Failure to insure that ability grouping or tracking systems designed to meet special language skills needs did not become educational dead-ends;
4. Failure to provide national origin-minority group parents with adequate notice--in a language they understood--of school activities.

These interpretice guidelines were published in the Federal Register.[29] The 1970 memorandum was significant in that it was the first expression of a legal requirement to provide special assistance to children with English-language deficiencies. Moreover, it applied to every school district in the country receiving any federal funds, not just those districts that were receiving categorical bilingual education funds available under Title VII. This new federal role clearly differed from the only previous federal role in this area--that of providing funds to enlightened school districts that submitted a voluntary proposal for expenditure of those funds on special projects for a small number of limited English-proficient (LEP) students under Title VII of the Elementary and Secondary Education Act (the Bilingual

Education Act). These new guidelines did not, however, spell out what the "affirmative steps" were to be, and said nothing about instructing LEP students in their native language.

The Courts. HEW was charged with enforcing Title VI, so that one approach to a perceived problem in a local school district was for LEP students and their parents to file a complaint with that agency. The advantage of the 1970 memorandum, however, was that aggrieved students and their parents did not need to wait for HEW to enforce the law. They could go directly to court and charge the school district with failure to comply with HEW's interpretation of Title VI. Since the requirements set forth in the memorandum were not legally binding regulations, however, school districts could rebut the charges by showing that they had used alternative means to comply with Title VI. Nevertheless, the burden was shifted to the school district and it was a burden that, in most cases, was unlikely to be met. It was still unclear, however, whether a school district found to have violated Title VI could be required to provide bilingual education.

In 1974, in Lau v. Nichols,[30] a case brought by private plaintiffs rather than by the government, the Supreme Court found that the San Francisco school system had violated Title VI by failing to provide approximately 1,800 non-English speaking students of Chinese ancestry with special instruction designed to overcome or compensate for their English language deficiency. In reaching this conclusion, the Court relied on HEW's 1970

memorandum, holding that it was a proper interpretation of Title VI and that recipients of federal aid were obligated to comply with it. The Court's decision responded in the terms in which the plaintiffs had framed the case. No specific remedy had been requested of the Court, the plaintiffs asking only that the Board of Education rectify the situation. Thus the Court said: "No specific remedy is urged upon us. Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another. There may be others."[31]

The Court also noted that "students who do not understand English are effectively foreclosed from any meaningful education."[32] The Court remanded the case "for the fashioning of appropriate relief."[33] The consent decree entered in the trial court required the San Francisco Unified School District to provide not only bilingual but also bicultural education to LEP students.

The Agency. Following the Lau decision, HEW appointed a task force, consisting mostly of professional educators who were strong proponents of bilingual education, to advise the agency on implementing the Lau decision. The result of this process was the "Lau Remedies" or guidelines, issued in 1975. They were poorly drafted and ambiguous, and were applied in piecemeal fashion across the country, since they were remedies for districts found out of compliance with Title VI. Between 1975 and 1980, however, nearly 500 compliance agreements were

negotiated on the basis of the "Lau Remedies"--and these agreements included most of the districts with a sizeable language minority population. Although there were no formal, uniform standards for districts to follow that would ensure that they were in compliance with Title VI, HEW's Office for Civil Rights (OCR) had begun to treat the "Lau Remedies" as if they were regulations meaning, at the least, that school districts had a heavy burden to overcome if they were not in full compliance with the requirements of the "Lau Remedies."

The Courts. Since Lau, a number of lower courts have enforced the "Lau Remedies," or have found the requirements in the "Remedies" to be essential components of an educational program providing meaningful access to an education for limited-English speaking children. These courts thus did not leave to local school districts the choice of which approach to take in remedying English-language deficiencies, but ordered school districts to provide bilingual instruction to their limited English-proficient students. In Cintron v. Brentwood Union Free School District,[34] a federal district court in New York found the school district's English-as-a-Second Language (ESL) program inadequate and in violation of various federal laws.[35] The plaintiff students, ruled the court, had a federal right to a bilingual-bicultural program of instruction provided by bilingual teachers. Another decision, Rios v. Read,[36] reached a similar conclusion. In a third case, Serna v. Portales

Municipal Schools,[37] the district court found the school district's proposed ESL remedy inadequate and ordered school officials to establish a bilingual-bicultural program of instruction. The tenth Circuit affirmed the holding on the ground that Title VI had been violated and that the district court's order was an appropriate remedy in the circumstances of that case.[38] Finally, in Aspira of New York Inc. v. Board of Education of the City of New York,[39] a consent agreement was approved by the district court under which the Board agreed to provide a program that included bilingual instruction in the substantive courses taken by LEP students.

At least two courts, however, have rejected a Title VI claim for bilingual education. In Otero v. Mesa County School District No. 51,[40] the case seemed to turn on the fact that the plaintiffs had failed to establish that there was a significant number of students in the school district who had real language deficiencies. The court rejected testimony that the academic failures of Spanish-surnamed students could be attributed to language deficiencies. The court held that too many other factors (for example, socioeconomic background) intervened to permit the causal finding requested by the plaintiffs. The court further held that the mere showing that Spanish was spoken in the homes of Spanish-surnamed students (which was not necessarily the only language spoken by the students) was insufficient to require a school district to provide special

language assistance. Thus, the result in the Otero case can be explained by the failure of the plaintiffs to prove the facts necessary to establish a violation of Title VI; that is, it was not clear that there were limited English-proficient children whose special language needs were not being met by the district.

And in Guadalupe Organization, Inc. v. Tempe Elementary School District,[41] the Ninth Circuit found no statutory right to bilingual-bicultural education but, as in Otero, the court said there was no showing that the current programs the plaintiff Hispanic and Yaqui Indian students were receiving were inadequate to redress any English language deficiencies they might have. Moreover, the court interpreted the plaintiffs' claim as one for maintenance of the native language--not transitional bilingual education--as well as for education in their native culture.

Then, in a suit filed by the State of Alaska and several of its school districts to prevent enforcement of the "Lau Remedies,"[42] the plaintiffs alleged that HEW was in violation of the Administrative Procedure Act[43] for not publishing the "regulations" for public comment.[44] Thus, in September 1978, the court approved a consent decree under which HEW agreed to publish the "Lau Remedies" as proposed regulations in the Federal Register. This served as the impetus to HEW to issue the Notice of Proposed Rulemaking (NPRM) that was finally published by the Department of Education in August 1980.[45]

The Agency. The NPRM was published in the Federal Register in August 1980 by the Department of Education, with an announcement that there would be six hearings at various locations around the country for testimony by the public, as well as public comment to be received directly by the Department in written form. The public comment period was originally scheduled for 60 days, but was extended to 75 days.[46] Nearly 450 people testified and over 4,500 written comments were submitted. The testimony at the hearings was predominantly in favor of the regulations or was opposed to them because they did not go far enough. The bulk of the written comment, however, was concerned that the regulations went too far. The major education organizations, with the exception of the National Education Association (NEA) and the California affiliate of the American Federation of Teachers (AFT), bitterly attacked the proposed regulations and the Department.

There were charges that Hispanic advocacy groups had bused in groups of parents to stack the hearings, hence the overwhelming testimony in favor of mandated bilingual education there. (It should be noted, however, that additional hearings were scheduled so that no one would be excluded who wanted to testify. Often there were no sign-ups for the evening session or the second day.) On the other hand, there were charges that the major national groups, such as the National Association of Secondary School Principals and the National School Boards Association--led by Albert Shanker, of the American Federation

of Teachers--mounted an all-out write-in campaign among their membership. (The truth probably lies somewhere in between.)

III. THE PROPOSED FEDERAL STANDARD

The Problem. Current estimates are that there are three and one-half million school-aged limited English-proficient children. The majority were born in the United States and many are second and third generation. The largest group of LEP children are Hispanic. The dropout rate among Hispanics is extremely high nationwide compared to Anglo children.[47] The real question is how to break the cycle of limited-English proficiency leading to poor progress in school leading to an early dropout from school--doomed to be repeated in the next generation because so many Hispanics are concentrated in barrios where the primary language is continually reinforced. The Office for Civil Rights had evidence that most school districts either failed to address this problem or failed to address it adequately.

The failure to address the problem, coupled with affirmative actions taken by school districts that tended to segregate LEP children from other students, was seen as a civil rights issue. The persistence of the problem, the history of the "Lau Remedies" and their endorsement by several district courts, and the consent agreement in Northwest Arctic to promulgate standards for Title VI compliance thus had led the Department of Education to promulgate a proposed set of rules

for comment by the public and other interested groups. The Department's approach may have been misguided, but the problem still remains to be addressed.

The NPRM. At this point, it may be useful to summarize the major features of the NPRM as published in August 1980. The underlying objective of the proposed regulation was to ensure that school districts would teach their limited English-proficient (LEP) children English as quickly as possible while, at the same time, teaching them their required courses in a language they could understand so that they would not fall behind in those courses while they were learning English.

The significant requirements include the following:

1. Identification: School districts were to identify the primary language of each of their students.

2. Assessment: The English language proficiency of all students identified as having a primary language other than English was then to be assessed. Limited English-proficient students were those scoring below the 40th percentile--when compared to non-minority students in the school district, all students in the state, or all students in the nation--in either reading achievement or oral language-proficiency. (The choice of which yardstick to use was to be the school district's.) Students who were LEP had then to be assessed to determine their relative proficiency in English and their primary language.

3. Services: The proposed rule required that the following types of services be provided, depending upon the category

of LEP student:

- LEP students who were clearly superior in the English language (English superior) were required to have the same access to compensatory help in English language arts as other low achieving students;
- Primary language superior students were to receive instruction from a qualified bilingual education teacher in both the primary and English languages in all required subjects, as well as instruction in the English language.
- Two alternatives were presented for public comment with respect to the treatment of comparably limited students (those students who were not measurably superior in either language):
  (1) Comparably limited students were to receive instruction designed to improve English language skills, but the district need not provide subject matter instruction in both their primary language and English, or
  (2) The district had to provide these students with bilingual instruction in their subject matter courses.
- The proposed rule permitted services to be modified for a school that has too few students to run a single class efficiently (25 with the same language

background within two grades of each other), and for high school classes.

4. Exit Criteria: Services could be discontinued at any time for students who were no longer limited English-proficient. After two years, students could be placed in a regular classroom if their English proficiency were above the 30th percentile.

In addition to these requirements, there were several others: parents could opt out of the program. School districts were entitled to a waiver of the regulations if they had a pre-existing program that could be shown to have achieved the same objective as the regulations, or if they wished to set up pilot programs utilizing another approach in a few of their schools. There was also a one-time waiver for a district that experienced a sudden influx of language minority children. Finally, separate classes in non-required subjects were prohibited, and no class could be segregated for more than half a day unless the district could demonstrate that no other less segregated and effective method of instruction was available.

A comparison of the "Lau Remedies," which had a five-year history and wide application, shows that, in many instances, they were more rigid than the standards included in the NPRM.

NPRM	REMEDIES
- 25 or more LEP students in a school within two grade levels before full panoply of services need be provided.	- Full panoply of services if at least 20 LEP students in a district, regardless of grade level.

- Programs must be operated with respect for cultural heritage.	- Implication that required courses must be bicultural.
- Exit from bilingual program if no longer LEP, if English superior, or if LEP student tests above the 30th percentile in English.	- Exit if showing made that student will achieve adequately in subject matter courses as well as in English language.
- Teachers: qualified under state law to teach subject and grade; meet local standards for bilingual instruction; and fluent in English and primary language.	- Teachers: must be culturally as well as linguistically familiar with background of students.
- Inform parents of placement decisions in language they understand.	- Inform parents of all school activities or notices in their language.
- Waivers: for unforeseen increases in LEP enrollment; pilot programs; if district had alternative program achieving same objective.	- No waivers. But requirements cannot be imposed without a finding of non-compliance with Title VI.

Earlier versions of the NPRM. There were many draft versions of the NPRM circulating within (and sometimes outside of) the Department before the proposed rule was finally published. Some of these versions included more options for comment prior to drafting a final rule. For example, one draft version proposed to elicit comment on whether LEP students should be those scoring at or below the 25th percentile rather than the 40th; whether modified services would be permitted for LEP students at grades seven and above rather than grades nine and above; whether students could be assigned to a racially or ethnically identifiable class if the subject were a required one, or whether assignment to a racially or ethnically identifiable class for more

than 50% of the school day was prohibited unless it could be shown that no other method of instruction was effective. The versions with "options" were strongly opposed by the Office for Civil Rights (OCR) and the Office for Bilingual Education and Minority Languages Affairs (OBEMLA) within the Department, as well as several Hispanic groups who had (unauthorized) access to the drafts. The Office of Planning and Budget felt just as strongly that more options should be provided. The Secretary was convinced by the arguments of those in favor of limiting the options to modify some of the earlier drafts. An argument often made was that the majority would be "voting" on just how much of a "civil right" the minority was entitled to have, and that Title VI of the Civil Rights Act was meant to prevent exactly that.

One of the principal issues raised within the Department was whether the Department could start from "scratch"--that is, consider a civil rights language minority regulation ab initio, or whether too many political and other problems might be caused by "rolling back" five years of negotiated agreements with school districts (and raised expectations on the part of parents and supporters of LEP children) under the "Lau Remedies." There was a tremendous amount of pressure, both within and outside the Department, brought to bear on this question. To "retreat" from what had been accomplished under the "Lau Remedies" would be to "sell out" the Hispanics, it was argued. Moreover, this "retreat" would be in the face of an increasing

number of district and circuit court decisions upholding the "Lau Remedies" or finding that the requirements in the "Remedies" were essential elements of an educational program that would meet the affirmative duty of school officials under Title VI. The Secretary opted for not ignoring the Lau history, making it clear that the NPRM should be compatible with both the "Lau Remedies" and previously negotiated compliance agreements pursuant to them. In addition, she stressed that the NPRM should conform with not only the letter but the spirit of the Supreme Court's decision in Lau v. Nichols, embodying the principle of equal educational opportunity.[48]

Other concerns raised by Hispanic groups and some staff within the Department were rejected by the Secretary. For example, serious objections were raised to the "waiver" provisions. The argument was that individual students might become involuntary participants in a district's demonstration project and thus lose their right to bilingual education. The opposing argument is that Title VI does not guarantee bilingual education. It guarantees equal educational opportunity, and although the Department believes that transitional bilingual education is usually the best route, other promising programs--for which there is strong evidence--might be as effective in assuring equal educational opportunity. Moreover, the burden of proof on a school district seeking such a waiver is, if anything, stronger under the NPRM than under the old "Lau Remedies." Strong objections were also raised to the failure of the exit criteria to include proficiency in all required

subjects. The counter argument made was that there is no clear legal support for requiring proficiency in all subjects; once students are proficient in English, they have equal access to subject matter instruction. It is difficult to prove, at that point, that failure to achieve at a certain percentile in subject matter areas is related to the student's language background.

Objections were also made to the provision allowing parents to withdraw their students from the required services on the ground that school districts might coerce the parents into making that "choice;" to the lower percentile allowed for exit compared to entrance; to the less than full panoply of services for high school students;[49] to the option that would have permitted "comparably limited students" to receive only remedial instruction in English; and various other provisions.

In sum, the debate within the Department (and outside) as the regulations were drafted was over whether the proposed requirements were too prescriptive and/or too costly on one side and, on the other side, whether the civil rights of language minority children could be watered down because of administrative and fiscal concerns of local school districts.

Justice Department. One other player in the development of the NPRM should be noted: The Department of Justice. Under Executive Order 12250,[50] the Attorney General had the authority to review and approve (or disapprove) regulations promulgated by the various Executive agencies under Title VI (as well as

other nondiscrimination statutes). In reviewing the draft NPRM, the Assistant Attorney General for Civil Rights raised several objections or at least doubts about portions of the NPRM as not sufficiently protecting the civil rights of LEP students. The Assistant Attorney General asked that the NPRM clarify whether the provision that permits parents to withdraw their children from required services meant that states or school districts were prohibited from requiring bilingual education. The provision was therefore redrafted to ensure that the regulations would not pre-empt state or local law that might require bilingual education, while at the same time ensuring that it did not suggest that anything in the NPRM prohibited states from allowing parents to withdraw their children from such instruction if they desired. The Civil Rights Division of the Justice Department also raised a concern that the regulations not undermine efforts to end segregation and a provision was accordingly drafted by the Department of Education. The fact that students identified as having a primary language other than English were to be tested solely through reading comprehension tests was also a matter of concern. The final version of the NPRM was thus drafted to permit various assessment procedures.

Thus some changes were made to get the approval of the Department of Justice for publication of the NPRM. A number of concerns raised by the Civil Rights Division were, however, not addressed by the Department of Education: for example,

the fact that the criterion for discontinuing or exiting from bilingual services was lower than the entrance criterion; the fact that the regulations did not cover black students who speak English dialects or "street English;" and the diminution in requirements for bilingual education for grades 9-12.

IV. POST-PUBLICATION EVENTS

The Players and Their Roles, Continued

RARG. Under the President's Regulatory Executive Order, if a proposed rule might have "an annual effect on the economy of $100 million or more," a regulatory impact analysis was required.[51] This the Department of Education attempted to provide. The main features of the analysis were as follows:

1. The Department rejected full compliance with the "Lau Remedies" in favor of the new NPRM. It was felt that the Lau requirements were too hard to follow--they were either too vague or written in highly technical language. In addition, the fact that the "Lau Remedies" relied on an assessment of relative language proficiency, rather than the NPRM's reliance on reading achievement test scores, made the plan too cost-inefficient. The NPRM was more precise regarding requirements bilingual teachers must meet and it also limited the number of bilingual teachers to situations where such teachers would be able to teach a substantial number of students.

2. The Department left open to further study the question of whether or not bilingual education should be required when a student was "comparably limited" (i.e., the student was limited

English-proficient but was comparably limited in his or her primary language). Two alternative plans were developed. Alternative A of the Proposed Rules would not require bilingual education when a student was "comparably limited" while Alternative B would.

3. The cost estimates for the NPRM were analyzed and compared at the 25th, 40th and 50th percentile levels of a test indicating limited English-proficiency. The Department opted for the 40th percentile as the most realistic and cost-efficient cutoff point. Students scoring below the 40th percentile were to be classified as limited English-proficient.

4. At the 40th percentile level, Alternative A of the NPRM would cost about as much as full compliance with the "Lau Remedies." Alternative B, requiring full bilingual services for "comparably limited" students, would cost significantly more.

5. The total number of eligible students under the "Lau Remedies" was estimated at 2,207,000. The total under the NPRM criteria varied between 1,473,000 and 4,718,000. (There were no data available to assess accurately the number of children that would test as "comparably limited.")

The Department estimated the cost of the services school districts were currently providing, and then estimated that the cost of providing services for eligible students currently unserved would be as follows:

(a) Under the NPRM, at the 40th percentile, if comparably limited children were not entitled to bilingual

instruction, the cost would range between $175,989,000 and $389,361,000.

(b) If comparably limited children were to receive bilingual instruction, implementing the NPRM would cost from $288,513,000 to $591,774,000.

(c) If, however, school districts were already in full compliance with the "Lau Remedies," the cost of implementing the NPRM under assumption (a) would range from minus $10,436,000 to $29,924,000, and under assumption (b) from $102,088,000 to $232,337,000.[52]

The Department noted that this was only a preliminary analysis and that it would continue to refine the analysis during the public comment period, which was extended to a period of 75 days.[53] It sought public comment on such hard-to-find data as how many bilingual teachers there were in the nation and how many LEP students were likely to fall into the "comparably limited" category.

One difficulty in undertaking the analysis was the timing. The process for development of the NPRM had been launched and political expectations about its date of publication had been raised by OCR without planning for a cost analysis. OCR had argued that the incremental costs of the regulation (over the cost of the "Lau Remedies" then in place) would be under $100 million and thus the proposed rule did not meet Executive Order criteria. This decision was reversed by the Secretary, but it was late in the day when the Office of Planning and

Budget, with the help of appropriate staff from OCR, began work on a regulatory impact analysis.

The President's Council on Wage and Price Stability had established a group known as the Regulatory Analysis Review Group (RARG). This group decided to make the Department's Civil Rights Language Minority NPRM one of its early test cases. Thus the NPRM and the Department's analyses were submitted to RARG. At the close of the public comment period, RARG submitted its report. The report focused on the need for further investigation of the cost-effectiveness of transitional bilingual education and of alternatives, as well as the need for a more "flexible" regulation. The Department of Education was ordered to do the following:

1. Provide further support for its decision to narrow the number of alternatives investigated--i.e., why wasn't English-as-a-Second Language investigated?

2. Examine and compare the cost-effectiveness of more alternatives (focusing on trade-offs between education and costs).

3. Incorporate in a new regulatory impact analysis the studies the Department had underway (but had not yet completed) on population estimates, teacher availability, and production of teachers.

4. Develop approaches that could be implemented immediately, even if these approaches did not include transitional bilingual education.[54]

The next step, in accordance with the Administrative Procedure Act, was for the Department of Education to analyze and evaluate all of the testimony and comments (including those of RARG), and redraft the regulations for final publication. But -- a funny thing happened on the way to a final regulation governing the civil rights of language minority children.

The Congress. The process in this case did not end with publication of a final regulation redrafted in light of the public comment received by the agency. Congress got into the act again. A proposal was introduced to amend Section 431(d) of the General Education Provisions Act, which provides that education regulations must be submitted to Congress for 45 days to allow Congress an opportunity to veto the regulations before they become final.[55] The amendment would have extended the coverage of Section 431(d) to civil rights regulations, which (with the exception of Title IX, sex discrimination) had previously been excluded from that provision. This would mean that after the public comment period, in which all of the various interest groups had had a chance to comment on the regulation, Congress would give some interests a second bite at the regulation.

This is not the appropriate place to fully air the debate over the constitutionality of the legislative veto.[56] However, it is relevant to note that the Administration, only a few months before, had vigorously reiterated its position that the only constitutional way in which Congress could exercise its control

over the regulations process would be to amend the legislation that the regulations were designed to implement.[57]

There were other Congressional attempts to limit the Language Minority regulations, all of them attached to appropriations bills.[58] The amendment that finally did pass, attached to a continuing resolution, prohibited the Department of Education from publishing final regulations before June 1981.[59] One unusual feature was the rather cryptic language in the report accompanying the amendment that the "Lau Remedies" were "only suggestions from the Department of Education to school districts for methods of complying with the equal education opportunity requirements under Title VI of the Civil Rights Act of 1964." It was unclear whether that signaled a retreat from the use of the "Lau Remedies" as the basis for negotiating compliance agreements.

The Courts. Since one of the new Administration's first acts was to withdraw the NPRM, there was never a final regulation. But it is useful, to complete the picture of the process, to suggest what might have happened had the regulation become final. The "final" regulation would have continued to be shaped by the courts so that a final final regulation could be somewhat different from that envisioned by either the agency or Congress.

First, the rule could be challenged as exceeding the scope of authority given to the Department of Education by Congress under Title VI. Thus various groups opposed to a particular regulation have yet another opportunity to take a swing at a

regulation.[60] Yet another approach is to challenge individual provisions on a case-by-case basis.

The role that the courts are playing with regard to the Education for All Handicapped Children Act regulations[61] provides a good illustration of the further shaping of regulations by the courts. Under that law, a handicapped child is entitled to a "free appropriate public education," which includes those "related services" necessary to enable the handicapped child to benefit from special education. Neither the law, nor the regulation as finally promulgated, however, is totally clear about what the related services are that must be provided. It may be appropriate for an agency, in certain circumstances, to wait to see what the effect of implementing the regulation might be without trying to define precisely all the possible issues that could arise under it. But before the fermenting process really could take place in the case of certain provisions of the Education for All Handicapped Children Act, so that the agency could decide whether an interpretive guideline, an amended regulation, or even a change in the legislation was necessary, private plaintiffs took several issues involving the definition of "related services" to court. As a result, a number of courts have now said that catheterization is a related service that must be provided by the school.[62] And, while a debate on this issue was proceeding within the Department, one court held that psychotherapy is a mandated "related service" for certain emotionally handicapped children.[63] Thus before

the agency has thought through an issue or what its position should be, and adopted a considered policy, the courts can constrict the area in which policy is to be made.

V. WHY? THE CONTROVERSY IN CONTEXT

The Department's regulation got caught up in issues that were much broader than the regulation itself. While they are difficult to define, this section attempts to outline some of the factors that affected the response to the regulation.

One factor is the larger debate over cultural pluralism and how our society deals with it. Should we have a unified culture -- an Anglo culture[64] -- or be a multilingual, multicultural society? Much of the reaction had more to do with the backlash to a perceived threat to the current system of Anglo-dominance than to the merits of the regulation itself. This backlash was partly fanned into flames by the media which failed to convey what the regulation was about and treated the Department's regulation as one that required native language and cultural maintenance rather than as transitional bilingual education leading to proficiency in the English language. Repeated articles analogizing the Department's approach to Quebec were far off the mark but added fuel to the fire.[65]

The regulation got caught up in a professional turf fight. Many non-bilingual teachers (and some Hispanics) saw the whole issue of bilingual education as nothing more than an employment program for Hispanics. If bilingual education (taught by quali-

fied bilingual teachers) were federally mandated, then, in an era of declining enrollment, non-bilingual teachers with greater seniority might be laid off before more recently hired bilingual teachers.[66] Various organizations of teachers and administrators therefore attacked provisions in the regulation requiring school districts to hire certified bilingual teachers.

English-as-a-Second Language (ESL) teachers were also threatened, ignoring that aspect of the regulation that required English to be taught as quickly as possible by whatever methodology the school district chose--which certainly could include ESL.

The regulation was attacked by the American Federation of Teachers, the National Association of Elementary School Principals, the National Association of State Boards of Education, the National School Board Association, the Council of Chief State School Officers, and other similar organizations for mandating a single pedagogical approach when educators were still debating which of several pedagogical approaches might be best--including total immersion in English or ESL. Other groups, such as the National Conference of State Legislators, attacked the federal regulation not so much because it invaded the traditional prerogative of educators but rather that of the states. This "state's rights" argument overlooked the fact that, at least according to OCR's evidence, the states and local school districts had been allowed, since 1970, to choose whatever methodology seemed most appropriate to them, but that in

many areas, the cycle -- of limited English-proficiency, of poor performance in school, and of high dropout rates -- was persisting into the third generation. Thus while the Department's response to a perceived wrong may have been overly prescriptive and inadequately supported by research, the approach suggested by its opponents failed to address the wrong at all.

This failure to recognize the real problem and the basic issue of access to educational opportunity was compounded by the media. The media did not raise the serious problems the NPRM was meant to address, however ineptly the Department's proposed regulation may have been designed, and thus the real problems were never debated. The only issues addressed by the media were issues of pedagogical evidence -- whether there was scientific proof that children learned English faster by having their subject matter courses (e.g., mathematics) taught in both English and their native tongue while they were also being taught to read and write in English; of fiscal impact; and of the inappropriateness of federal control.

The media also discussed the regulation as if it were a totally new policy by the new Department of Education, rather than a policy that began to evolve under the Nixon Administration in 1970, and was shaped by court actions. The five-year period between 1975 and 1980, in which nearly 500 compliance agreements under the "Lau Remedies" were negotiated, was ignored.

And, as pointed out above, the media focused on the issue of divisiveness, treating the regulation as one requiring maintenance of the native language and culture, rather than one requiring the teaching of English and transitional bilingual education in required subject matter courses (meaning, of course, the use of two languages -- English and the native language -- until the student could be phased into a regular class).

The final factor affecting the reaction to the Department's regulation is the concern over federal regulatory power generally. In part, those who opposed the federal exercise of power in this case aligned themselves with those who wanted to curtail federal regulatory power over social issues generally. Several Senators discussed the role that the federal government had played in civil rights and suggested possible measures that would curtail the federal role in desegregation, sex discrimination, and discrimination against the handicapped, as well as with regard to language minority children.

A number of Congressmen felt that the Department had exceeded its authority in regulating in the manner that it had or in regulating in this area at all. Reference was frequently made to the language of the Department of Education Organization Act. That Act says as follows:

> (a) The establishment of the Department of Education shall not increase the authority of the Federal Government over education or diminish the responsibility

> for education which is reserved to the local school system . . .
>
> (b) No provision of a program administered by the Secretary . . . shall be construed to authorize . . . any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution or school system . . . except to the extent authorized by law.[67]

Some Senators argued that in creating the Department of Education, this language was meant to restrict the authority that the Department of Health, Education & Welfare had previously been entitled to exercise. The Department's response was three-pronged:

(1) The same or similar language had appeared in various statutes enacted by Congress dealing with specific programs. When HEW's actions had been challenged as in violation of such provisions, courts had held that these provisions did not affect the ability of HEW to regulate in the Title VI area.[68]

(2) The Department of Education did not exercise any authority that exceeded that previously exercised by HEW and there is nothing in the Department of Education Organization Act that suggests that the new department's authority would be less in the civil rights area than the authority possessed by the department out of which it was being carved.

(3) Since the regulation in question was drafted to implement Title VI of the Civil Rights Act, then the exception

in Section 103 of the Department of Education Organization Act, "except to the extent authorized by law," applies. This argument, however, does not go very far if it cannot be shown that this regulation is within the scope of Title VI, and this was clearly part of the debate.

VI. UNRESOLVED ISSUES RAISED AND LESSONS LEARNED

The Change in Political Mood. The legislative history of the 1974 version of the Bilingual Education Act indicates that the act leaned strongly in the direction of maintenance of the native language and culture, rather than the learning of English and the teaching of required subject matter courses in the language the student best understands until the student is fluent in English. "Cultural pluralism" and "ethnic solidarity" were the concerns of the day. Although the Bilingual Education Act was a grant-in-aid statute, the direction in which many of its supporters wished to go was clear.

Congress also made clear, in the Equal Education Opportunities Act of 1974,[69] that the issue was a civil rights issue as much as an educational one. In that act, which incorporated the findings of Lau v. Nichols, Congress stated that the denial of equal educational opportunity includes "the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional program." In United States v. Texas,[70] the district

court found that Congress had, with the passage of this act, created new substantive rights beyond the Fourteenth Amendment.

Moreover, some of the Title VII programs were clearly being run as programs for the inculcation of ethnic solidarity. There were widely publicized stories of programs which were totally language and cultural maintenance programs in which the teachers themselves did not know any English. While these Title VII programs may have been a distinct minority, the Bilingual Education Program was tarnished as a result.

By the late seventies, there was a distinct change in the political mood. Those who promoted "cultural pluralism" and ethnic solidarity were no longer in the ascendancy. The attitudes of the late sixties and early seventies no longer prevailed. The Department of Education was therefore isolated. Had similar regulations been drafted shortly after the Lau decision, there might have been sufficient support in Congress to reinforce the Department's efforts. By 1980, however, it was a very different Congress. The Department tried to emphasize that the regulations focused on the teaching of English as quickly as possible, while required subject matter courses were to be taught in both English and the child's native language only until the child was sufficiently fluent in English to be phased into regular classes in those courses. The regulations also were designed to ensure that only those students who were clearly limited-English proficient were to be included in bilingual programs, contrary to what had occurred in a number of Title VII programs. Nevertheless,

with the worst examples of Title VII programs being placed before the public and a lack of support from Congress, the Department had no adequate means to get before the public its intentions. A federal agency has no real resources to conduct a campaign on a proposed regulation. Indeed, it is probably not appropriate for an agency to mount an extensive media campaign, particularly during the period in which public comment is requested and being received. The agency has to appear open to a serious consideration of all suggestions at the time the final regulation is being drafted.

The change in political mood encompassed more than the particular issues surrounding bilingual education. In the late sixties and early seventies, there was a great deal of activity on behalf of groups long excluded from the mainstream of society. Today, the climate toward education, and toward the educationally disadvantaged in particular, has significantly changed. In the 60's, education was seen as a public good and a matter of national rather than solely local concern. For example, among the motivations that have infected the programs of an earlier day were: improvement in the status of minorities and the poor (whether out of a sense of social justice or to raise the gross national product), or improvement in our ability to beat the Russians (as in the National Defense Education Act).[71] The motivations that infect attitudes, and ultimately the programs, of today include: reduction in the level of taxes, reduction in government (whether at the federal, state or local level), and

improvement of a failing economy. In the 60's, the economic pie was expanding. Thus, those who were in the mainstream could afford to be generous and let those who had long been excluded from the table share in the pie. The mainstream was not threatened by the availability of sufficient jobs or by inflation. Today the economy is shrinking and there is not only no pie to share, but those who have been excluded are fighting among themselves for non-existent crumbs. There is not much interest in promoting the civil rights of others when one's own economic security is threatened. Nor is education as important to the general public as it once was, in view of declining enrollment and an increasingly large senior population whose interests lie in health care, housing, or recreation, rather than in education.

With little support from the general public and the Congress, and a well-organized media campaign mounted by opponents of the proposed regulation, the Department seemed out of phase with its efforts. In sum, there was a lack of consensus on the need for this regulation and on its wisdom, and there was insufficient capacity in the Department, even if it were appropriate for it to do so, to build that consensus.[72]

Problems with the Regulation and Unanticipated Reactions. The Department not only had no capacity to build a consensus; it is not clear that the Department knew the size and scope of the problem. The Department has no formal or regularized process for surfacing reactions to the proposed regulation during the drafting of the NPRM. Various Hispanic groups made themselves heard at

various levels in the Department, but the only voices raising objections to some of the arguments raised by MALDEF and others were internal to the Department and not those of organized external groups. At least two questions are raised by this: (1) why weren't the opponents more articulate within the Department since it was widely known that the Department was attempting to rewrite the "Lau Remedies" into regulations, and (2) should the Department have a more formal process for surfacing reaction and meeting it prior to publishing an NPRM for general comment?

The Department also probably made a serious mistake, as a new, and politically controversial Department, in putting forward the Language Minority NPRM as its first major initiative in an election year. This just provided fuel to those who had opposed the establishment of a department of education for fear that it would lead to federal control of education.

The specificity of the regulation and the inadequacy of the Department's defense of some of the provisions gave proponents of the regulations little with which to do battle. First, the Department probably should have rethought the entire issue as if there had been no history under the "Lau Remedies." If it could not find adequate legal support for the regulation in Title VI and Lau v. Nichols, at least it should have articulated more clearly why the Department should not have considered the issues ab initio, but only in light of the history of negotiated compliance agreements.

There were several reasons, apart from any substantive justifications, why the regulation was so specific. One was the prior history since Lau of the failure of school districts to address the problem adequately until found in violation of Title VI by OCR. The justified suspicion of civil rights groups and the experience of OCR led to a more rather than a less specific regulation. Secondly, OCR was under a court order, in a case that had been brought by civil rights groups, to bring to conclusion both the backlog and current Title VI language minority complaints that had been filed with OCR.[73] The process of investigation and determination whether there is a Title VI violation is lengthy and OCR had an enormous backlog of complaints that had not been investigated. A regulation with a great deal of specificity would made administration of this aspect of Title VI much easier. In the face of a court order, a complex problem, and limited staff, a more specific rather than less specific regulation would clearly facilitate its administration. Nevertheless, without a full understanding of the failure of many school districts to comply with even minimal requirements of Title VI, and the tremendous number of complaints that were therefore filed, the public saw this as an approach premised on a lack of trust of local school districts, and hence the worst possible approach unless the case could be made that all other approaches were doomed to failure. The problem was compounded by the Department's inadequate justification for some of the provisions:

(1) It could not adequately defend the choice of the 40th percentile for entry into the program or the 30th percentile for exit over any other percentile figure.

(2) It could not assure the opponents that there were enough qualified bilingual teachers available or likely to become available in the near future to ensure that the program did not become an employment program for native language aides who might also be LEP, and community activists.

(3) It could not clearly demonstrate that some of the low achievement and high dropout rates among many language minority children were the result of language rather than socioeconomic background.

(4) The expectation was that after three years, most LEP children would be English-proficient, but there was no hard evidence that this was true. (The regulation did provide that no school district was required to provide a bilingual program for more than five years for any particular student.)

Finally, the cost-effectiveness study clearly should have begun earlier. The Department was still in the process of organizing itself--it did not officially become a department until May 4, 1980--and thus let OCR's argument that the regulation was not subject to the Executive Order prevail for too long.

Other Civil Rights Issues. If this is a civil rights issue, a number of questions are raised by the particular NPRM drafted by the Department. First, does Title VI of the Civil Rights Act of 1964 establish an individual or only a group right? The federal proposed rule on the civil rights of language minority

children is a compromise on a number of points in this regard. For example, the requirement of bilingual teachers is waived in the case of high school-aged children. Moreover, there must be 25 children of the same language group within two grades of each other within the same school before the full panoply of requirements applies. (There are, of course, requirements that aides or tapes, or magnet schools, or some other method be used to assist the children to learn English as quickly as possible where the full bilingual provisions do not apply.)

Can the right to special language assistance be waived and by whom? The federal rule permits parents to elect not to participate in a bilingual program. Who should make those decisions for children? Do we (local school officials, or state or federal officials) know enough about linguistic needs and how children learn to make those decisions in spite of what parents want? And might granting the right to opt out lend itself to manipulation by school officials, especially if pressuring one parent in a class of 25 would eliminate the need for more stringent requirements? What about the rights of the other 24 parents and children?

On the other hand, it is not clear that the Lau decision requires any affirmative action on the part of school districts to correct English-language deficiencies where the number of LEP students is very small. While the majority opinion did not discuss whether there was any numerical requirement, Justice Blackmun, joined by the Chief Justice, stressed that he concurred in the Lau

opinion solely because of the size of the affected group.

> "I merely wish to make plain that when, in another case, we are concerned with a very few youngsters, or with just a single child who speaks only German or Polish or Spanish or any other language other than English, I would not regard today's decision, or the separate concurrence, as conclusive upon the issue whether the statute and the guidelines require the funded school district to provide special instruction. For me, numbers are at the heart of this case and my concurrence is to be understood accordingly."[74]

What number of unserved children triggers the violation? The regulation indicates that some services (even if not the full panoply) must be provided every LEP child. But the concurring opinion in Lau suggests that Title VI may not impose such stringent requirements.

Is there a basis for the Department's regulation if Title VI requires a finding of intentional discrimination? Both the Justice Department and the Department of Education in the previous Administration relied on Lau v. Nichols to argue that the Title VI standard is "effect" and not "intent." However, Bakke[75] suggests that some justices at least would hold that Title VI merely restates the Fourteenth Amendment requirements, including the intent requirement of Washington v. Davis.[76] The district court in United States v. Texas held that Title VI did require

a finding of intentional discrimination.[77] In that case, he found de jure action by officials against Mexican-American students. But if this holding should prevail, what might it mean for the application of this regulation to Hungarians, Vietnamese, or other groups where there has not been a history of intentional discriminatory acts of isolation? Not all language minority groups have been treated in the same way historically as Mexican-Americans in parts of the Southwest.

Finally, if we are dealing with the civil rights of individuals, how should the Department have assessed the comments of various interest groups in developing a final regulation? Should the Department proceed with what it thinks is right (and how does it decide that?) or try to balance competing interests? Is there some minimum protection to which each language minority child is entitled under Title VI that no comments should be allowed to undermine unless Congress changes Title VI itself?

The Future. The current Administration has pulled back the proposed regulation. The present Secretary of Education has suggested that it should be left to the states to decide what is appropriate, asking the states to submit plans but providing no enforcement mechanism. The current system in place, however, is the enforcement system under the old "Lau Remedies," which, in most aspects, is far more stringent than the NPRM. Thus, ironically, school districts are now under greater constraints than they would have been had the NPRM become final.

FOOTNOTES

1. Brown v. Board of Education, 347 U.S. 483 (1954).

2. See, e.g., Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, 2000d-1 (1976).

3. Congress' authority to enact such statutes can be found in Section 5 of the Fourteenth Amendment: "Congress shall have the power to enforce the provisions of this article by appropriate legislation." See, e.g., Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Katzenbach v. Morgan, 384 U.S. 641 (1966).

4. 42 U.S.C. § 2000d (1976).

5. 20 U.S.C.§§ 1681 et seq. (1976).

6. 29 U.S.C. § 794 (Supp. III, 1979).

7. See Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1 (1976).

8. See, e.g., Education Amendments of 1978, 20 U.S.C. §§ 2701 et seq. (Supp. III, 1979)(original version, Title I of the Elementary and Secondary Education Act of 1965, at 20 U.S.C. §§ 241a et seq. (1976)). Title I was based on concepts not necessarily a part of the 14th Amendment -- e.g., compensatory education would break the poverty cycle, raise the GNP, and lessen welfare costs and the costs of crime.

9. See, e.g., The Emergency School Aid Act, 20 U.S.C. §§ 1601 et seq. (1976).

10. See, e.g., The National Defense Education Act of 1958, 20 U.S.C. §§ 401 et seq. (1976).

11. Education Amendments of 1978, 20 U.S.C. §§ 3101, 3102 (Supp. III, 1979).

12. U.S. Const. art. 1, § 8, cl. 1. See Oklahoma v. United States Civil Service Comm., 330 U.S. 127 (1947). Cf. Steward Machine Co. v. Davis, 301 U.S. 548 (1937)(social security tax is constitutional even though its operation was conditioned upon a state's failure to develop a similar state-funded program.)

13. For example, failure to comply with the maintenance of effort provision in Title I of the Elementary and Secondary Education Act, Education Amendments of 1978, 20 U.S.C. § 2736a (Supp. III, 1979), may entail the withholding of Title I funds, but would not affect funds under other statutes.

14. When so directed by Congress, the authority of the executive branch agencies thus derives from Congress' Article I power. In addition, under Article II, Section 3, the Executive must "take care that the laws be faithfully executed." U.S. Const., art II, § 3. Thus the Constitution gives to the Executive Branch the duty of implementing and enforcing the laws passed by Congress.

15. U.S. Const. art III, § 2, cl. 1.

16. San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

17. See Levin, "The Courts, Congress and Educational Adequacy: The Equal Protection Predicament," 39 Md. L. Rev. 187, 205-226 (1979).

18. Id. at 226.

19. Bilingual Education Act, P.L. No. 90-247, §§ 701 et seq., 81 Stat. 816 (1968) (current version at 20 U.S.C. §§ 3221-3223, 3231-3233, 3241, 3242, 3251, 3252, 3261 (Supp. III, 1979)).

20. Bilingual Education Act, No. 90-247, § 704(c), 81 Stat. 817 (1968) (current version at 20 U.S.C. §§ 3221 et seq. (Supp. III, 1979)).

21. Bilingual Education Act, 20 U.S.C. §§ 880b et seq. (1976) (current version at 20 U.S.C. §§ 3221 et seq. (Supp. III, 1979)).

22. Bilingual Education Act, 20 U.S.C. § 880b(a)(1976)(current version at 20 U.S.C. § 3222 (Supp. III, 1979)).

23. Bilingual Education Act. 20 U.S.C. § 880b-1(a)(4)(A)(i) (1976)(current version at 20 U.S.C. § 3223(a)(4)(A)(i) (Supp. III, 1979)). However, the language of the Act clearly indicates that English as a Second Language (ESL) programs are eligible for funding, and many school districts have used federal funds under this Act to provide ESL programs rather than truly bilingual instruction.

24. H. R. Rep. No. 805, 93rd Cong.2d Sess., reprinted in U.S. Code Cong. 8 Ad. News 4148 (1974).

25. Department of Education, Preliminary Cost Estimates of Title VI Language Minority Rulemaking 16 (August 11, 1980) (unpublished report).

26. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976). (Emphasis added.)

27. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1 (1976).

28. 35 Fed. Reg. 11595 (1970).

29. Id.

30. 414 U.S. 563 (1974). The Ninth Circuit, in deciding against the plaintiffs, was sharply divided as to whether or not the lack of an educational program for non-English speaking students constituted a violation of the 14th Amendment's Equal Protection clause. The Supreme Court did not address the Constitutional issue, deciding the case solely on statutory grounds.

31. 414 U.S. at 564-65.

32. Id. at 566.

33. Id. at 569.

34. 455 F.Supp. 57 (E.D.N.Y. 1978).

35. The court referred to the following statutes: The Equal Educational Opportunities Act of 1974, § 204, 20 U.S.C. § 1703 (1976); the Bilingual Education Act, 20 U.S.C. § 880b (1976); the Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000d (1976). See Roos, "Bilingual Education: The Hispanic Response to Unequal Educational Opportunity," 42 Law & Contemp. Prob. 130 (1978).

36. 480 F.Supp. 14 (E.D.N.Y. 1978).

37. 351 F.Supp. 1279 (D.N.M. 1972), aff'd on other grounds, 499 F.2d 1147 (10th Cir. 1974).

38. 499 F.2d at 1154. The district court had found the failure of the school district to establish a bilingual education program to be a violation of the Equal Protection Clause.

39. 394 F.Supp. 1161 (S.D.N.Y. 1975).

40. 408 F.Supp. 162 (D. Colo. 1975), vacated on other grounds, 568 F.2d 1312 (10th Cir. 1977).

41. 587 F.2d 1022 (1978).

42. Northwest Arctic School District v. Califano, No. A-77-216 (D. Alas. Sept. 29, 1978).

43. Administrative Procedure Act, 5 U.S.C. § 551 et seq. (1976), as amended by 5 U.S.C. § 552 et seq. (Supp. III, 1979).

44. Administrative Procedure Act, 5 U.S.C. §§ 553(b), 553(c) (1976).

45. 45 Fed. Reg. 52052 (1980).

46. 45 Fed. Reg. 58145 (1980).

47. The dropout rates for whites for the period 1972 to 1978 was eight percent while that for Hispanics for the same period varied between 15 and 19 percent. Nearly 40 percent of the Hispanic population between the ages of 18 and 24 have not completed high school compared with about 14 percent of the white population. National Center for Education Statistics, The Condition of Education for Hispanic Americans 36 (1980).

48. Secretary Hufstedler, as a judge on the Ninth Circuit Court of Appeals, had been involved in an aspect of the Lau v. Nichols case. A three judge panel of that court was presented with the argument that the Fourteenth Amendment to the Constitution imposed an affirmative duty on school districts to provide special assistance to school children who could not understand the language of instruction. The panel rejected this argument on the grounds that mere use of English as the sole language of instruction was not evidence of present governmental discrimination on the basis of ethnic origin, nor was there any evidence that the plaintiffs' language deficiencies were related to any past discriminatory action by the state. 483 F.2d 791, 796-97, 799 (9th Cir. 1973). A request was made for hearing the case en banc. Judge Hufstedler dissented from the denial of the en banc hearing. There were two groups of plaintiff children in the case: (1) 1,790 Chinese school children who spoke no English and were taught none, and (2) 1,066 Chinese children who spoke no English and who received some kind of remedial instruction in English. 483 F.2d at 805. Judge Hufstedler pointed out:

> These Chinese children are not separated from their English-speaking classmates by state-erected walls of brick and mortar (Cf. Brown v. Board of Education (1954) . . .), but the language barrier, which the state helps to maintain, insulates the children from their classmates as effectively as any physical bulwarks. Indeed, these children are more isolated from equal educational opportunity than were those physically segregated blacks in Brown; these children cannot communicate at all with their classmates or their teachers.
>
> . . . .

> The majority opinion concedes that the children who speak no English receive no education and those who are given some help in English cannot receive the same education as their English speaking classmates. In short, discrimination is admitted. Discriminatory treatment is not constitutionally impermissible, they say, because all children are offered the same educational fare, i.e., equal treatment of unequals satisfies the demands of equal protection. The Equal Protection Clause is not so feeble. Invidious discrimination is not washed away because the able bodied and the paraplegic are given the same state command to walk.

Id. at 806.

Although the judge did not specify what the remedy for this plaintiff should be (her dissent was concerned only with whether or not the plaintiffs had made a prima facie case that their constitutional rights were violated), she did note that Chinese non-English speaking children who received "some remedial tutelage in English," without more, were discriminated against relative to English-speaking children. They were denied equal access to the educational opportunity provided by the school district. Thus seven years later, the Secretary found herself in the position of having to specify the nature of that affirmative duty which the Supreme Court, in reversing the majority opinion of the Ninth Circuit panel, said that school districts owed to LEP students--at least under Title VI, if not under the Constitution.

49. In United States v. Texas, the district court held that bilingual education must be provided LEP students in grades K to 12 rather than just the first few grades. 506 F.Supp. 405 (E.D. Tex. 1981).

50. Exec. Order No. 12250, 45 Fed. Reg. 72995 (1980).

51. Exec. Order No. 12044, 43 Fed. Reg. 12661 (1978), as amended by Exec. Order No. 12221, 45 Fed. Reg. 44249 (1980).

52. Department of Education, Preliminary Cost Estimates of Title VI Language Minority Rulemaking (August 11, 1980) (unpublished report).

53. The Administrative Procedure Act requires only a minimum of 30 days. 5 U.S.C. § 552b(g) (1976).

54. Regulatory Analysis Review Group, Department of Education's proposed Title VI Language Minority Rules for Bilingual Education (October 20, 1980)(unpublished report submitted by the Council on Wage and Price Stability).

55. 20 U.S.C. § 1232(d) (1974).

56. The subject has been a much debated one. See, e.g., Dixon, "The Congressional Veto and Separation of Powers: The Executive on a Leash?" 56 N.C.L. Rev. 423 (1978); Miller and Knapp, "The Congressional Veto: Preserving the Constitutional Framework," 52 Ind. L.J. 367 (1977); Cooper and Cooper, "The Legislative Veto and the Constitution," 30 Geo. Wash. L.Rev. 456 (1962); Schwartz, "Legislative Control of Administrative Rules and Regulations: The American Experience," 30 N.Y.U.L. Rev. 1031 (1955).

57. Letter opinion from Attorney General Benjamin R. Civiletti to Secretary of Education Shirley M. Hufstedler (June 5, 1980). See also Regulatory Reform and Congressional Review of Agency Rules: Hearings on H. R. 1776 Before the Subcomm. on Rules of the House Comm. on Rules, Pt. 1, 96th Cong., 1st Sess. (1979)(statement of Attorney General Benjamin R. Civiletti); President's message to Congress, June 21, 1978.

58. An amendment introduced by Congressman McClure directed the Secretary immediately to withdraw the proposed rules relating to limited-English-proficient students and mandated that none of the funds in the appropriation bill were to be used "to promulgate or enforce regulations which required a state or local educational agency, as a condition of eligibility for receipt of funds . . . to address the educational needs of students of limited English speaking ability by any particular method, program, curriculum, personnel requirements, or classification." Not only would this have impaired the ability of the Department to enforce Title VI protections of the rights of national origin minorities, but it would also undercut the Bilingual Education Act of 1968 which provides funds for programs in bilingual education and has provided technical assistance and other resources to deal with the educational needs of new entrants from Cuba, Haiti and other countries.

59. Appropriations--Fiscal Year 1981, Pub. L. No. 96-369, § 113, 94 Stat. 1356 (H.J. Res. 610, Oct. 1, 1980).

60. See e.g., the challenges to HEW's attempt to cover employment in its Title IX regulations. Romeo Community Schools v. U.S. Dept. of HEW, 438 F.Supp. 1021 (E.D. Mich. 1977), aff'd, 600 F.2d 581 (6th Cir. 1979); Brunswick School Board v. Califano, 449 F.Supp. 866 (D. Me. 1978), aff'd, 593 F.2d 424 (1st Cir. 1979); Junior College District of St. Louis v. Califano, 455 F.Supp. 1212 (E.D. Mo. 1978), aff'd, 597 F.2d 119 (8th Cir. 1979); University of Toledo v. U.S. Dept. of HEW, 464 F.Supp. 693 (N.D. Ohio 1979).

61. 20 U.S.C. § 1401, 45 C.F.R. 121a et seq. (1980).

62. See, e.g., Tatro v. State of Texas, 625 F.2d 557 (5th Cir. 1980).

63. See Matter of "A" Family, 602 P.2d 157 (Mont. 1979). Other courts, while the issue was being debated within the Department, have held that the provision of an "appropriate education" may require school officials to provide schooling in excess of the 180 days of instruction per year that is provided all children. See, e.g., Battle v. Commonwealth of Pennsylvania, 629 F.2d 269 (3d Cir. 1980); Georgia Association of Retarded Citizens v. McDaniel, 511 F.Supp. 1263 (N.D. Ga. 1981).

64. Some people have argued that this has acted to make the non-Anglo child feel inferior and this, in turn, affects his self-concept and ability to learn. Evidence of this nature was presented to the district court in United States v. State of Texas, 506 F.Supp. 405, 415 (E.D. Texas 1981), app. pending (5th Cir. 1981); the judge made findings of fact accordingly.

65. The Department was, for example, attacked by editors of the San Francisco Examiner, in a conversation with the author, for allowing "hordes of immigrants" to pour across the border and vote in Spanish. "If they want to come to our country, they should be made to vote in English." Repeated attempts by this author to explain to them that the Voting Rights Act of 1965, amended by Congress in 1970 to provide for non-English-speaking voters, 42 U.S.C. § 1973 aa-1a (1975), was not the work of the Department of Education, were ignored.

66. This was not an unreasonable fear. This issue has arisen in at least one recent case. See Morris v. Brentwood Union Free School District, 49 App. Div.2d (1975), aff'd, 52 App. Div.2d 584, leave to appeal denied, 40 N.Y.2d 802 (1976).

67. 20 U.S.C. § 3403 (1979).

68. See, e.g., Plaquemines Parish School Board v. United States, 415 F.2d 817 (5th Cir. 1969); United States v. County School Board, 221 F.Supp. 93 (E.D. Va. 1963).

69. 20 U.S.C. § 1703 (1976).

70. 506 F.Supp. 405 (E.D. Tex. 1981).

71. National Defense Education Act of 1958, § 101, 20 U.S.C. § 401 (1976).

72. One could argue that the fact that 27 states have statutes or regulations that permit or require bilingual education services similar to those required by the Department's proposed regulation suggests that there is some consensus. However, there are now pressures to change or weaken some of these laws. Colorado has just repealed its bilingual education law, substituting an ESL requirement.

73. Adams v. Califano, 430 F.Supp. 118 (D.D.C. 1977).

74. Lau v. Nichols, 414 U.S. at 572.

75. University of California Regents v. Bakke, 438 U.S. 265 (1978).

76. 426 U.S. 229 (1976).

77. 506 F.Supp. 405 (E.D. Tex. 1981).